BCAP Payday Loans Consultation

Consultation on the introduction of scheduling restrictions for television advertising of high-cost short-term credit

Issue date: 07/10/2015

Closing date: 16/12/2015

Legal, decent, honest and truthful

CAP

Contents

1. Executive Summary

The Broadcast Committee of Advertising Practice (BCAP), author of the UK Code of Broadcast Advertising (the BCAP Code), is consulting on whether to introduce scheduling restrictions on the television advertising of high-cost short-term credit (HCSTC), a category of product more commonly referred to as payday loans.

Payday loans have given rise to much public concern, including about their advertising. BCAP is committed to ensuring that the BCAP Code and any associated guidance, which already regulates HCSTC advertisements, is sufficiently comprehensive to prevent HCSTC advertisements from leading to harm, particularly by exploiting the vulnerable, for example families who are facing difficult financial circumstances or children or young people.

Scheduling restrictions are some of the best known restrictions on advertising in the UK. However, BCAP is concerned to ensure that scheduling restrictions are not seen as the automatic response to concerns about advertising for a sensitive product: scheduling rules are a tool with a specific purpose (see Section 6, page 15 for details). This consultation document sets out information on scheduling rules in general, together with as much information as BCAP has at its disposal on how scheduling restrictions might work for HCSTC advertising, to ensure as far as possible that debate on scheduling is well informed. The document also sets out the statutory regulation of HCSTC products by the Financial Conduct Authority. It finishes (in Section 9, page 25) by asking the question: do respondents consider that a scheduling restriction on HCSTC advertising is justified, given all the factors set out in the document?

BCAP's call for evidence on the need for scheduling restrictions followed its review of the BCAP Code rules governing the content of HCSTC ads. The call for evidence was prompted by calls for change relating to TV advertising only: radio advertising was not considered and is not addressed in this consultation. The call for evidence set out the calls for change BCAP had received, along with the potential harms that respondents have identified as arising from that advertising.

In response to calls for additional scheduling restrictions, including a pre-9pm ban on HCSTC advertising, BCAP has set out:

- its existing restrictions,
- the policy objectives for these,
- the way in which they are applied,
- their legal underpinning, and
- the reasons why it has not, to date, imposed scheduling restrictions on HCSTC advertising or introduced a pre-9pm ban on the advertising of any product category.

BCAP's call for evidence found little robust evidence of advertising-related harm, but the information provided by respondents has been invaluable in identifying issues that relate to the potential effect of HCSTC advertising. BCAP believes that there are gaps and inadequacies in the evidence base it has seen; particularly, that the precise harm that a scheduling restriction might help to prevent has not been articulated. Further, BCAP considers that, at the time of publication, it is unclear whether the additional limitations on advertisers' rights to reach a legitimate adult audience and the right of the audience to receive ads for HCSTC, as well as the potential financial impact on broadcasters that would derive from scheduling restrictions, are proportionate to BCAP`s stated policy objectives of rules that are transparent, accountable, consistent and targeted only where regulation is needed. However, the information that has been provided will enable the preliminary research carried out to date to be continued with a focus on addressing these gaps.

BCAP has also provided an assessment of the potential economic impact of restrictions on broadcasters and potential redistribution of HCSTC ads throughout the television schedule; BCAP is obliged to consider such information in determining the proportionality of any restriction. Overall, scheduling restrictions based on either a 4-15 or 10-15 index (see paragraph 6.2 below for an explanation of audience indexing) would not be likely have a significant effect on the number of impacts in commercial airtime, so their removal would not be likely to cause significant revenue loss to broadcasters. Furthermore, the majority of any loss that might occur would be likely to be mitigated by broadcasters.

Finally, BCAP invites respondents to answer questions on whether scheduling restrictions are necessary and proportionate, and what evidential grounds might support their introduction.

The consultation will close at 5pm on Wednesday 16 December 2015. For more information on the next steps, please see section 10.

2. Introduction to BCAP and the ASA

2.1 The Broadcast Committee of Advertising Practice

BCAP is the regulatory body responsible for maintaining the UK Code of Broadcast Advertising (the BCAP Code) under a contracting-out agreement with the Office of Communications (Ofcom).

Ofcom has statutory responsibility, under the Communications Act 2003, for maintaining standards in TV and radio advertisements. Ofcom entrusted BCAP and the broadcast arm of the Advertising Standards Authority (ASA) with the regulation of broadcast advertisements in 2004 in recognition of CAP and the ASA's successful regulation of non-broadcast advertisements for over 40 years and in line with better regulation principles.

The BCAP Code regulates all advertisements on television channels and radio stations licensed by Ofcom and all advertisements on Sianel Pedwar Cymru (S4C) and S4C digital, including teleshopping channels and any additional television service (including television text services and interactive television services). The BCAP Code is enforced against Ofcom-licensed broadcasters, Sianel Pedwar Cymru (S4C) and S4C digital. Broadcasters are required by the terms of their Ofcom licence, and, for S4C, by statute, to observe the standards set out in the BCAP Code.

The members that make up BCAP include broadcasters and trade associations representing advertisers, broadcasters and agencies. BCAP must seek advice on proposed Code changes from an expert consumer panel, the Advertising Advisory Committee (AAC). In accordance with Section 324 of the Communications Act 2003, BCAP must consult on proposed Code changes. BCAP strives to ensure that its rule drafting is transparent, accountable, proportionate, consistent and targeted where action is needed, in accordance with the Communications Act 2003. Ofcom must approve Code changes before BCAP implements them.

Information about BCAP and the AAC is available at www.cap.org.uk, which includes the BCAP Code.

2.2 The Advertising Standards Authority

The ASA is the independent body responsible for administering the BCAP Code and UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and ensuring that the self-regulatory system works in the public interest. The Codes require that all marketing communications are legal, decent, honest and truthful.

The ASA receives and investigates complaints from the public and industry. Decisions on investigated complaints are taken by the independent ASA Council. The ASA Council's rulings are published on the ASA's website, www.asa.org.uk, and made available to the media. An Independent Review Procedure exists for interested parties who are dissatisfied with the outcome of a case.

If the ASA Council upholds a complaint, the advertisement must be withdrawn or amended. BCAP conducts compliance, monitoring and research to enforce the ASA Council's decisions.

The ASA's work in regulating broadcast advertising is funded by a levy on the cost of advertising space, administered by the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof). Both finance boards operate independently of the ASA to ensure there is no question of funding affecting the ASA's decision-making.

Information about the ASA, including the complaint-handling and investigations procedures and the ASA's independent review procedure, is available at www.asa.org.uk. Information about Asbof and Basbof is available at www.asbof.co.uk.

3. Regulatory framework of the BCAP Code

3.1 Communications Act 2003

The Communications Act 2003 ('the Act') sets out provisions for the regulation of broadcasting and television and radio services, including provisions aimed at securing standards for broadcast advertisements. The most relevant standards objectives to the subject under review in this consultation document are:

319(2)(a) that persons under the age of eighteen are protected; and

319(2)(h) that the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented.

3.2 Directive 2010/13/EU concerning the provision of audiovisual media services (AVMS)

Article 9(g) of AVMS provides, under "*Provisions applicable to all Audiovisual Media Services*" that:

"*(g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations."*

3.3 Article 10 of the European Convention on Human Rights concerning freedom of expression (Article 10)

Article 10 provides that:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

3.4 Financial Conduct Authority (FCA) definition of "high-cost short-term credit"

'High-cost short-term credit' (HCSTC) is defined in the Glossary of the FCA's Consumer Credit sourcebook in the following terms:

High-cost short-term credit

a regulated credit agreement:

(a) which is a borrower-lender agreement or a P2P agreement;

(b) in relation to which the APR is equal to or exceeds 100%;

(c) either:

(i) in relation to which a financial promotion indicates (by express words or otherwise) that the credit is to be provided for any period up to a maximum of 12 months or otherwise indicates (by express words or otherwise) that the credit is to be provided for a short term; or

(ii) under which the credit is due to be repaid or substantially repaid within a maximum of 12 months of the date on which the credit is advanced;

(d) which is not secured by a mortgage, charge or pledge; and

(e) which is not:

(i) a credit agreement in relation to which the lender is a community finance organisation; or

(ii) a home credit loan agreement, a bill of sale loan agreement or a borrower-lender agreement enabling a borrower to overdraw on a current account or arising where the holder of a current account overdraws on the account without a pre-arranged overdraft or exceeds a pre-arranged overdraft limit.

BCAP has adopted this definition for its work on HCSTC.

4. Policy objectives

4.1 Policy objectives

BCAP's general policy objectives accord with those of the Communications Act 2003 noted in Section 3.

BCAP intends its rules to be transparent, accountable, proportionate, consistent, targeted only where regulation is needed and written so that the rules are easily understood, easily implemented and easily enforced. BCAP has elaborated on these principles and on the type of evidence it takes into account in assessing regulatory change in its approach to evidence-based policy-making .

4.2 BCAP's policy objectives in relation to HCSTC advertisements

The following standards contained in section 319 of the Communications Act are relevant to and inform BCAP's policy objective to ensure that the BCAP Code is sufficiently comprehensive to prevent HCSTC advertisements from leading to harm, particularly by exploiting the vulnerable, e.g. families who are facing difficult financial circumstances:

> *(a) that persons under the age of 18 are protected; …*
>
> *(f) that generally accepted standards are applied to contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material; ….*
>
> *(h) that the inclusion of advertising that may be misleading, harmful or offensive in television and radio services is prevented;*
>
> *(i) that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with …*

In setting or revising standards, under section 319(4), regard must be had to:

> *(a) the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally, or in programmes of a particular description; and*
>
> *(b) the likely size and composition of the potential audience for programmes included in television and radio services generally, or in television and radio services of a particular description; …*

4.3 BCAP's existing regulation of HCSTC advertisements

In terms of protecting against potential harms, the following BCAP Code rules apply to HCSTC advertisements:

- rule 1.2, a general provision on responsibility of advertising, which provides that

Advertisements must be prepared with a sense of responsibility to the audience and to society; and

- rule 5.9[1], a specific prohibition relating to children, which provides that

  Advertisements must neither directly exhort children to buy a product or service nor encourage them to ask their parents, guardians or other persons to buy or enquire about a product or service for them.

The "Financial products services and investments" section of the BCAP Code, which applies to all HCSTC advertisements, contains general rules which set out, amongst other things, the conditions for broadcasting ads for regulated activities, the types of ads which may only be broadcast on specialist channels and the conditions for advertising consumer credit.

4.4 Other regulation of HCSTC advertisements

HCSTC taken out on or after 2 January 2015 has been subject to a cost cap imposed by the FCA, under the Financial Services and Markets Act 2000, and set out in the Consumer Credit Sourcebook (CONC) section of the FCA Handbook at 5A.3. There are three elements to the cap:

- *an initial cost cap of 0.8% per day – interest and fees charged must not exceed 0.8% per day of the amount borrowed;*
- *a £15 cap on default fees – if borrowers default, fees must not exceed £15. Firms can continue to charge interest after default but not above the initial rate; and*
- *a total cost cap of 100% - borrowers must never pay more in fees and interest than 100% of what they borrowed.*

Since July 2014, and under 3.4.1 of CONC, all HCSTC ads have had to carry the following risk warning:

> *"Warning: Late repayment can cause you serious money problems. For help, go to moneyadviceservice.org.uk"*

Under section 50 of the Consumer Credit Act 1974, it is an offence to send a person under 18, with a view to financial gain, any document inviting him to borrow money, to obtain goods or services on credit or hire; or to apply for information or advice on borrowing money, otherwise obtaining credit, or hiring goods.

[1] It should be noted that BCAP is due to publish the outcome of a consultation to amend the wording of this rule for legal reasons relating to maximum harmonisation legislation that this rule seeks to reflect.

5. The case for change

5.1 Background

The use of HCSTC has increased since the onset of the economic downturn. Concerns about the impact of this product, in particular on the financially vulnerable, have led to calls for further regulatory oversight of the sector, including of its advertising. This has included calls for a ban on HCSTC ads appearing around TV programmes aimed at children, the introduction of a 9pm TV watershed ban and additional restrictions on the content of these ads.

5.2 BCAP's content review

In July 2014, in the context of concerns set out in Section 5.1, BCAP announced a review into its content rules that regulate TV ads for HCSTC. The aim of this review was to ensure that the BCAP Code is sufficiently comprehensive to prevent HCSTC advertisements from exploiting the vulnerable - particularly families who are facing difficult financial circumstances - and to assess their propensity to appeal irresponsibly to children, including by encouraging so-called 'pester power'.

BCAP's review involved:

- an assessment of whether payday loans advertising appearing on television breaches BCAP's rules designed to protect children; and

- an attempt to identify common techniques and styles used in TV payday loan ads that fall short of breaching the rules but may, through repeated use, fuel concerns about undue appeal to children.

The review, which involved independent ASA Council members and assessed 145 ads against the rules, concluded that there is not a need for changes to the BCAP Code content rules designed to protect children, in the context of HCSTC advertising. It did not find substance in perceptions that some payday loan ads inappropriately appeal to children, or are aimed at encouraging children to ask their parents to take out a payday loan.

The review also noted the existing rule that no ad may directly exhort children to purchase a product or to ask others to do so for them, and that CAP[2], BCAP and the

[2] CAP is the self-regulatory body that creates, revises and enforces the CAP Code. The CAP Code covers non-broadcast marketing communications, which include advertisements placed in traditional and new media, sales promotions, direct marketing communications and marketing communications on marketers' own websites. The marketer has primary responsibility for complying with the CAP Code and ads must comply with it. Ads that are judged not to comply with the Code must be withdrawn or amended. Parties that do not comply with the CAP Code could be subject to adverse publicity, resulting from a ruling by the Advertising Standards Authority, or further sanctions including the denial of media space. CAP's members include organisations that represent advertising, sales promotion and direct marketing and media businesses. Through their membership of CAP member organisations, or through contractual agreements with media publishers and carriers, those businesses agree to comply with the Code so that marketing communications are legal, decent, honest and truthful, and consumer confidence is maintained. Further information about CAP is available at www.cap.org.uk.

ASA undertake to act quickly and effectively to tackle any ad that falls foul of this important rule.

However, BCAP did find that light-hearted, jovial treatments in ads do have the potential to trivialise the seriousness of taking out HCSTC, and that such treatments could and have breached the social responsibility rules. BCAP, the ASA Council and the Advertising Advisory Committee all supported the need for guidance to reduce the likelihood of ads trivialising loans, and BCAP published joint guidance with CAP on 3 June 2015.

The guidance clarifies the spirit in which the rules must be interpreted, particularly the rule that requires ads to be responsible to the audience and to society. It provides clear warning that ads risk breaching this rule if they:

- *suggest loans are a suitable means of addressing ongoing financial concerns;*
- *condone non-essential or frivolous spending; or*
- *unacceptably distort the serious nature of the products.*

The guidance suggests that animation, catchy upbeat jingles and humorous themes must be used with particular care, and proposes phrases to help payday loan advertisers communicate reasonable benefits of the product e.g. "It helped out as my boiler was broken and I was two weeks away from pay day".

5.3 BCAP's extension of its content review

In July 2014, when BCAP announced its content review, BCAP was aware of Ofcom's 2013 audience research into payday loans advertising on television. That research primarily focused on the frequency, volume and reach of payday loan advertising to adult audiences, including different socio-economic groups; however it also provided useful and authoritative data on children's exposure to that advertising. Ofcom's research found that payday loans ads comprised a relatively small 0.6% (or 1 in every 166) of TV ads seen by children aged four to fifteen during the period under analysis. Payday loan ads aired on children's channels amounted to an average of two impacts per child over the year. In total, children on average saw around 1.3 payday loan ads on television per week.

In light of Ofcom's findings about children's limited exposure to TV advertising for payday loans, and in the absence of research or analysis linking children's exposure to payday loan advertising to evidence of harm, BCAP did not consider it proportionate, when its review was launched, to consider the appropriateness of the scheduling of HCSTC ads, including payday loans, on TV. Consequently, BCAP confined its review to examining the effectiveness of its content rules but welcomed any submissions of relevant evidence to the contrary which it committed to consider.

During its content review, BCAP was made aware of research carried out by the Children's Society into the effects of payday loan advertising. The Children's Society asked whether BCAP might extend the scope of its review to consider fully the scheduling of payday loan advertising in the context of this and any other relevant pieces of research. In December 2014, BCAP announced an extension of its review and called for submissions of any further new evidence to help it assess whether there is a need for restrictions on how TV HCSTC ads are scheduled.

The concerns highlighted to BCAP during its call for evidence (which to some extent mirror concerns highlighted to BCAP before its content review), and which have formed the basis of calls for the introduction of scheduling restrictions, can be loosely categorised as ‘normalisation’, ‘pester power’ and ‘disapproval of the product’.

5.4 Normalisation

BCAP’s call for evidence has revealed concerns that children – who, according to research, have developed their “money habits” by the age of seven (these include: counting; concepts of exchange and equivalence; concepts of earning and income; and the ability to plan ahead) – are being exposed to high frequency ads for HCSTC featuring inappropriate content, which suggests this form of credit is a normal way of managing money. This has been referred to, as a general concept, by respondents as “normalisation”.

Concerns have been raised that, like gambling and alcohol, payday loans are not legally available for people aged under 18, and that, similarly to gambling and alcohol advertising, advertising of HCSTC risks normalising behaviour which may be harmful to children in adult life.

Respondents have argued that children should receive financial education from their school and their parents, and the apparent high frequency of payday loan advertising undermines this, and provides an alternative form of ‘education’ which promotes HCSTC as a normal way to manage finances. They have pointed to research that suggests that this normalises positive attitudes to what can be a very high-risk product. The goal of scheduling restrictions in part should be to reduce the frequency with which children are exposed to these messages.

It is not straightforwardly a policy imperative for BCAP to prevent HCSTC from being seen as normal. Insofar as HCSTC is offered in compliance with the FCA cost cap, it is a legally available product. However, BCAP considers that it is obliged, under its policy objectives as set out in section 4, to set standards to prevent the normalisation of irresponsible use of HCSTC in advertising. In fact, BCAP and the ASA consider that the mere depiction or featuring of irresponsible use, even without the suggestion that such use is normal, in any ad carries the potential for harm and, as such, breaches BCAP’s rules on responsibility.

BCAP’s content review noted that the depiction of uses for HCSTC in advertising can be both responsible (e.g. loans being used in emergencies to pay for bills) and irresponsible (e.g. loans being used to fund holidays). Unless the normalisation is of irresponsible use, normalisation in advertising is not problematic unless the use of the product is inherently harmful; if irresponsible use is normalised, or even depicted, this would fall foul of BCAP’s content rules.

5.5 “Pester power”

‘Pester power’ describes the phenomenon of children putting pressure on their parents to buy products for them or their family. In relation to HCSTC ads, this relates particularly to parents with limited financial means confronted by their children, who have viewed (and to some extent understood) HCSTC advertisements, with the result that the adults are driven by a desire to support their family and / or guilt to take out loans in circumstances where, when properly advised, they should not. BCAP rule 5.9 (as set out at 4.3 above) seeks to prevent ‘pester power’ and

BCAP examined the issue in its content review (see 5.2 above), including whether its rules adequately addressed pester power.

5.6 Disapproval of the product

Much of the debate on HCSTC has focused on fundamental reservations about HCSTC as a product, which have, in turn, led to ‘normalisation’ of the product being seen as inherently problematic or undesirable. These reservations are an issue for which the FCA has responsibility under statute; as an advertising regulator, BCAP must be mindful of this and the extent of its own delegated statutory authority, which means that it cannot regulate the availability or use of the product itself.

6. Scheduling restrictions

6.1 Policy objectives for scheduling restrictions

The BCAP Code is designed to provide protection for children (those aged 15 and under) and young people (those aged 16 or 17) in two ways: through restrictions on the creative content of ads and, where appropriate, scheduling restrictions. Scheduling restrictions, contained in Section 32 of the BCAP Code, allow BCAP to limit the exposure of children and young people to advertising for products that are unsuitable to be directed at them e.g. ads for products like alcohol and medicines that are age-restricted for sale and often easily accessible, including around the home. They do this by preventing such ads from being scheduled in or around programmes directed at or of particular appeal to children and young persons.

Scheduling rules are designed to limit, but do not entirely eliminate, exposure of children and young people to advertising for products that should not be directed at them. They are complemented by strict content rules to ensure that the advertising that children and young people do see is not of particular appeal to them and will not cause them harm. In this way, BCAP seeks to balance the need to protect children and young people from harm with the right of adult viewers to see advertising for products of relevance and interest to them.

Currently, the Code does not include any scheduling restrictions that limit the advertising of financial products in and around programmes of particular appeal to children or young persons. The only financial products that presently attract scheduling restrictions are spread betting services and contracts for difference, which may only be advertised on specialised financial channels, stations or programming because of their higher risk and greater complexity. These restrictions are designed to ensure that broadcasters limit, almost exclusively, the scheduling of these ads on channels and in and around programmes that attract an audience with specialist financial knowledge and who are capable of understanding the relatively high risks that are associated with these products.

Respondents to the call for evidence have referred to scheduling restrictions that exist for alcohol and gambling products: advertising for both is subject to 120-index scheduling restrictions (under rules 32.2.1 and 32.2.2; see section 6.2 below) which prevent them from being advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal to audiences below the age of 18. The sale of these products to under-18s is generally prohibited by law. Despite the fact that the provision of HCSTC to under-18s is not unlawful, under contract law a person under the age of 18 has no capacity to enter into a credit agreement, hire agreement, credit card or loan. The effect of this is that any debt arising is unenforceable. For obvious reasons, therefore, HCSTC lenders go to significant lengths to avoid entering into any agreements with any person under the age of 18.

Alcohol and gambling have two further factors directly relevant to their advertising being subject to scheduling restrictions: the potential for under-18s to want to use the products; and their accessibility to under-18s (for example, alcohol being available in the home, and the use of over-18s to place bets on behalf of under-18s). BCAP has not seen evidence of an appetite for use of HCSTC by under-18s; and because of the strict measures put in place by lenders to prevent unenforceable loans being provided to under-18s, HCSTC is not accessible to this age group.

6.2 Restricting the scheduling of categories of advertising: the 120-index

The BCAP Code requires broadcasters to restrict specified categories of advertising or advertising for specified products around programmes commissioned for a particular age group; principally directed at a particular age group; and likely to appeal particularly to an age group.

In practice, it is almost always straightforward for broadcasters to identify a programme commissioned for or principally directed at children or young people, because of the nature of its content. Broadcasters must not schedule restricted advertisements in or adjacent to such a programme, no matter the time at which the programme is scheduled to be broadcast.

Identifying programmes that appeal particularly to children (or children and young people) is more complicated. Broadcasters are therefore required to make use of audience data or, if such data is unavailable or unreliable, other reasonable criteria to predict a programme's likely appeal, and to act accordingly.

Audience Indexing is the predictive tool that allows broadcasters to identify programmes likely to appeal particularly to children and young people. Using Broadcast Audience Research Board (BARB) data, which breaks down the audience into categories of viewers, in this case by age (e.g.10 to 15-year-olds), Audience Indexing determines what proportion of a particular category of viewers are watching a programme relative to the proportion of the audience as a whole (all viewers aged 4 and over) watching the same programme. The process allows broadcasters to identify programmes that appeal disproportionately to particular groups, either various age groups of children or all children and young people.

The Audience Indexing process results in an index score for each programme (or programme part in the case of long-form programming). This is assessed against a threshold index score of 120, above which a programme is considered to appeal particularly; this is known as the "120 Index". Broadcasters must apply the correct age category to meet the requirements for each type of advertising or product covered by the Section 32 rules; for instance, the under-18 class of restriction relies on BARB data age category 10-15 and applies to advertising for products such as alcohol, gambling and e-cigarettes.

Channels devoted to children's programmes, or where the generality of the programme content might reasonably be expected to appeal particularly to children, will not at any time be able to carry restricted advertising.

BCAP's content rules (which prevent advertisers from directly exhorting children to ask their parents to take out a loan, and prevent irresponsible content, such as the depiction of loans being used to fund frivolous purchases) and guidance (e.g. on the trivialisation of the taking out of a loan) would apply at all times, including where a scheduling restriction exists.

6.3 The legal basis for scheduling restrictions

The FCA has not made rules under the Financial Services and Markets Act 2000, as set out in the Consumer Credit Sourcebook (CONC) section of the FCA Handbook, which concern when or where HCSTC advertising can appear. Parliament has not thought it necessary to impose statutory regulation in relation to this (as it has, for example, in relation to tobacco advertising and political advertising). In late November 2014, two crossbench amendments to the Consumer Rights Bill seeking restrictions on payday loan advertising (which would have amounted to scheduling restrictions, albeit not in name) were defeated in the House of Lords:

- *Where a lender in the high cost consumer credit market is selling a service which may only be purchased by a consumer aged 18 years or more, public communications about that service, including promotional material and any promotional activities, shall not be targeted at people below the age of 18; and*

- *Within six months of the passing of this Act, the Secretary of State must make regulations to regulate the content and the timing of public communication about high-cost short-term credit agreements with a view to protecting children and other vulnerable persons from harm or exploitation*

Television advertising, including the scheduling of television advertising, is a matter for Ofcom and BCAP.

Insofar as HCSTC complies with the FCA's cost cap (see section 4.4), it is a legally-available product and can be advertised by licensed companies.

Article 10(1) of the ECHR protects the right to commercial freedom of expression (for the purposes of this consultation, the right of licensed companies to advertise HCSTC on television), but to a lesser degree than political, religious or cultural expression. Article 10 is not a bar to member states requiring the licensing of TV broadcasting. And television is (still) regarded as being a particularly powerful medium in respect of which advertising restrictions may be more easily justified. Any restrictions must be necessary and prescribed by law.

The BCAP Code, including its rules on scheduling, is prescribed by law (by the Communications Act 2003; see Legal Framework section above). Any amendment to the BCAP Code will be prescribed by law, providing the proper consultation process is followed. Any restrictions must also be necessary in a democratic society for one of the legitimate aims listed in Article 10(2), including the protection of health or morals, and/or the protection of the reputation or rights of others. BCAP considers that such aims might include:

(a) protecting adults with limited financial means from being pressurised by their children, who have viewed (and to some extent understood) HCSTC advertisements, with the result that the adults are driven by a desire to support their family and/or guilt to take out loans in circumstances where, when properly advised, they should not (i.e. pester power, but with the adults needing protection, not children, save to the extent that children suffer disappointment when adults refuse to take a loan); or

(b) protecting a section of society against the normalisation of HCSTC as a way to manage finances, when better alternatives are available.

BCAP considers that any of these could be a legitimate aim of a scheduling restriction, if there is evidence of harm, or a real potential for harm. Responses to BCAP's call for evidence, particularly the submissions received from the Children's Society, have been extremely valuable, both in identifying legitimate aims and in identifying the type of evidence that might exist / be needed to justify the imposition of scheduling restrictions.

Any restrictions that BCAP might impose must be a proportionate means of achieving a legitimate aim; and regard must be had to whether there are less restrictive alternative means of achieving the aim. The greater the restriction (in terms of speech, lost revenue, increased costs, etc), the greater the need for robust evidence to justify such a restriction. As far as the burden of any restriction is concerned, BCAP must assess how much any proposed measure might cost advertisers / broadcasters if they are not allowed, for example, to advertise around programmes that appeal particularly to children, or advertise before 9.00pm.

6.4 BCAP's position on the use of a pre-9pm ban for product categories

In its research, the Children's Society called on the Government to impose a pre-watershed ban on payday loans advertising, as *"this will significantly reduce the inappropriate exposure of children to misleading payday loans adverts"*. As set out in Section 6.1, BCAP uses scheduling restrictions to prevent ads for certain products from being scheduled in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below certain ages. This is a targeted form of restriction that seeks to determine the likely audience for specific ads, regardless of when in the broadcast schedule they appear.

Research shows that a significant proportion of children and young people watch television after 9pm. In 2012, almost 20% of viewing of commercial channels by those aged 4 to 15 took place after 9pm, with over a quarter of older (10 – 15) children's viewing being then.

The 120-index applies throughout the broadcast schedule, including after 9pm, so provides a more consistent and targeted way of limiting children's exposure to certain types of ads. A pre-9pm ban could result in the concentration of ads into a smaller amount of time and, in light of the viewing figures above, could mean that its effect is counterproductive. In some cases, BCAP and the ASA do restrict certain ads from appearing before 9pm; this arises from the content of the ads, as opposed to their product category. BCAP's scheduling policy in relation to product categories, as set out in sections 6.1 - 6.2, uses content restrictions coupled with scheduling restrictions to ensure that the right of adults to view ads for products of interest to them and broadcasters' right to freedom of expression are respected, while the number of ads for those products seen by children is minimised, and the content of them is controlled such that they are not of particular appeal to children.

In some instances, BCAP and the ASA take the view that the *content* of an ad is sufficiently strong and its potential to distress younger children or otherwise harm them is sufficiently high to outweigh the right of adults to view the ad before a certain time e.g. before 9pm. In such circumstances, content restrictions cannot sufficiently mitigate even the modest level of exposure that would result from an ad being scheduled around a programme that (through use of audience indexing measures) is *not* said to have particular appeal to children.

Examples of such ads include those that are likely to cause distress to children (such ads will often carry timing restrictions imposed by Clearcast), or ads that fall within the scope of BCAP rule 32.7, which states:

Administering medicines, vitamins or food supplements to children

32.7 *Advertisements in which children are shown having a medicine, vitamin or other food supplement administered to them must not be broadcast before 9pm.*

This rule is directed at a very specific type of ad content, as opposed to product category, that might encourage self-administration or administration by children to others of easily-accessible products that might result in harm if children were to see and potentially emulate the content in the ad.

While a pre-9pm ban might lead to the removal of a number of HCSTC advertisements from television, both in absolute terms and when compared to a 120-index restriction, most of its effect would fall on programmes of particular appeal to adults rather than children or young people. A pre-9pm ban could also significantly reduce broadcaster revenues, to an extent inconsistent with a proportionate approach. It would deny adults access to information on and advertising of HCSTC, and deny HCSTC lenders the right to target a legitimate adult audience.

BCAP considers that a pre-9pm ban would be a disproportionate approach, particularly when compared to BCAP's preferred targeted approach of using a 120-index scheduling restriction. A pre-9pm ban is an indiscriminate measure that does not assess whether children or young people are likely to see a specific ad. However, notwithstanding concerns about the potential concentration of HCSTC ads after 9pm, such a measure could result in a significant reduction of children’s exposure. If this were the case, BCAP would need to see evidence that reduced exposure was necessary to combat some form of harm that exposure could lead to.

In all other cases, BCAP uses 120-index scheduling restrictions, as opposed to restrictions based on time, to keep ads for certain product categories away from programmes of particular appeal to those who fall within certain age groups. This includes products such as alcohol, gambling and e-cigarettes. BCAP does not consider that HCSTC presents a greater risk than these other products, which carry a well-established potential to cause harm, and thus BCAP does not consider a pre-9pm ban is either consistent with its scheduling policy to date, which has served well to balance the protection of viewers and interests of broadcasters and advertisers, or proportionate or justified. BCAP’s view is reinforced by the existence of 120-index scheduling restrictions which provide a more efficient method of limiting children’s exposure to ads.

7. BCAP's call for evidence

7.1 Introduction

BCAP's call for evidence revealed little robust evidence of harm arising from the advertising of HCSTC, but the information provided by respondents to the review has been invaluable in identifying issues that relate to the effect of HCSTC advertising and associated risks. Although the information BCAP has seen to date, as part of the review process, does not present a compelling case for greater restrictions, BCAP considers that a public consultation is necessary for BCAP to satisfy itself, in relation to its own regulatory objectives, as set out in section 4.1, and societal expectations, that it has seen all relevant information that might support such a measure. This will also provide BCAP with a further opportunity to set out the gaps that exist in the information available, enabling the research carried out to date to be continued with a focus on addressing these gaps.

7.2 Information received by BCAP

BCAP received submissions to its call for evidence which asserted the following (BCAP has reproduced the full submissions here, to enable readers to assess the basis on which the statements were made):

- 68% of children aged 13–17 had seen at least one payday loan advert on television in the last seven days
- 3% of parents who have not used a payday loan reported that their children have suggested that they take out a payday loan; of those who have taken out a payday loan, 27% reported that their children have suggested they take out a payday loan
- 34% of children aged 13 – 17 described payday loan ads as fun, tempting or exciting
- The more frequently children see adverts for loans, the more likely their parents are to say they believe lenders put pressure on people to take on credit they can't afford
- 75% of parents would like to see a ban on payday loan advertising on television before 9pm
- Over half of children aged 13 to 17 know the names of three or more of the top payday loan companies
- Of 3000 parents asked, 14% of parents say that when they have refused to buy something for their child who is under 10, they have been 'nagged' to take out a payday loan for it
- The ASA has frequently taken action against irresponsible payday loans advertising: in 2013 the ASA issued 11 rulings about HCSTC ads and 8 HCSTC ads were withdrawn or amended as a result
- The Ofcom research on exposure to HCSTC advertising was carried out for 2012 and that more recent figures could be expected to show a decrease in the number of ads

- In order to minimise the exposure of children and other vulnerable groups to HCSTC advertising, some lenders have taken self-imposed measures, which have included:
    - no placement of their ads on channels dedicated to children's programming;
    - prevention of buying spots that index at or above 120 on the 120 index; and
    - avoidance of buying slots around programmes that historically score highly against the 120 index
- Ofcom research shows that over 20% of children watch TV after 9pm, so a watershed ban might not reduce exposure
- Payday loan advertising should be banned from channels devoted to children's programming
- The potential for serious harm for families who take out payday loans means that children should be protected from advertising that will affect their future susceptibility to take out such products. The perception that taking out HCSTC is a normal part of everyday life and a way of managing finances is not an attitude that should be allowed to develop in the consumers of the future
- An advertising restriction on payday loan advertising is both necessary and proportionate to protect children
- There is no benefit for short term lenders to market to children and both lenders and advertising agencies go to great lengths to ensure that the BCAP Code is respected. Beyond the requirements of the Code, lenders strive to ensure that payday loan advertisements are not broadcast on children's channels and not deemed to be targeted at children
- Whilst the volume of advertising of payday loans has increased, children's exposure is still very low
- Consumer groups and other commentators confuse daytime television with children's television
- Some of the research was conducted at the end of the long summer holiday break and it is reasonable to assume that the children surveyed were likely to have been watching more television and therefore seen more advertisements. In order to be robust, the research would need to be repeated during a school term.

7.3 Analysis of information received by BCAP

BCAP makes the following observations in relation to the information provided above:

- The exposure data provided supports similar conclusions to those made in Ofcom's 2013 audience research; it says that children asked had seen at least one payday loan ad on television in the last week, whilst the Ofcom research says an average of 1.3 payday loan ads per week is seen by children on television. Children's recall of advertising is not a reliable measure of exposure

- The information does not show any causal links between advertising and normalisation or pester power, but does identify areas of correlation that might warrant further investigation to determine whether causal links exist

- 75% of parents would support a pre-9pm ban on payday loan advertising on television; no reasons are provided to support reasons for these views. This might be an area for further research to enable respondents to identify any further issues

- 80% of children would not take out a payday loan under any circumstances, even in emergencies. This suggests that children might be aware of the potential harm from HCSTC, and, again, is an area that might justify further research

- The finding that parents are being 'nagged' (i.e. being subject to pester power) is an online self-selecting poll and should be read in this context

- All findings related to the content of HCSTC advertising and the BCAP rules that restrict irresponsible content have been addressed by BCAP's content review

- The research concludes that advertising of payday loans normalises the use of payday loans. But the evidence that children were significantly (9:1) more likely to suggest to their parents that they take out a payday loan if they had done so in the past suggests that the fact that parents had taken out a payday loan is likely to normalise payday loans for children

- As noted above, it is not straightforwardly a policy imperative for BCAP to prevent payday loans from being seen as normal and, as such, BCAP would need to see evidence of the normalisation of irresponsible use (for example, frivolous use of loans to fund purchases, such as holidays) in advertising, which BCAP has not seen during its content review or through submissions to its call for evidence

- All research should be viewed in the context in which it was carried out; if the timing of the research could be responsible for certain conclusions, the research would be more robust if it was repeated at a different time to remove this

- All lenders who responded expressed a commitment to not target children and say that they have no interest in doing so; some achieve this by imposing their own restrictions to stop inappropriate scheduling

- Some of the submissions do not add empirical evidence but do provide anecdotal support for restrictions on advertising in general; they do not specify what the restrictions might be. BCAP considers that such anecdotal evidence provides hypotheses that could be further explored through empirical evidence

8. BCAP's assessment of exposure data and economic impact

In addition to the information received during its call for evidence, BCAP has sought data on:

1. The number of impacts before and after the FCA cost cap came into force on 2 January 2015 (see section 4.4 for details of the cap); this was done by measuring the impacts of all HCSTC ads appearing during commercial airtime in Quarter 1 (Q1) 2014 and Q1 2015

2. The number of impacts that would be removed from the Q1 2015 data if a) a 4-15 index were applied and b) a 10-15 index were applied[3]

3. The value of the impacts that would be removed from the Q1 2015 data if a) a 4-15 index were applied and b) a 10-15 index were applied

4. The amount of revenue loss resulting from a 4-15 or 10-15 index that might be mitigated by broadcasters by displacement into unrestricted areas of the schedule

Definitions

"Commercial airtime"	means all commercial channels excluding the BBC and other non-commercial channels
"Advertising spots"	means one occasion on which an advertisement is broadcast
"Impacts"	means the number of times a 30 second commercial spot advertisement is viewed. For example, ten impacts could be achieved by ten people viewing a single 30 second advertisement, or by one person seeing the advertisement ten times

[3] For the avoidance of doubt, BCAP's under-18s and under-16s scheduling restrictions which are in place for certain product categories already and which are included as options for the outcome of this consultation (see section 9) generally use a 10-15 index (See Annex 3 of BCAP's Advertising Guidance referred to in section 6.2 above) . A 4-15 index has been used as an attempt to model the effect of a less restrictive index and to provide a rough indication of the difference, in terms of impacts and economic impact on broadcasters, between an under-18s and under-16s scheduling restriction, in the absence of retrospective data about editorial decisions on whether a programme was commissioned for or principally directed at a certain age group, as opposed to those about particular appeal, using audience indexing. This is the key difference in practice between an under-18s and under-16s restriction where both rely on a 10-15 index.

Methodology

The exposure data has been taken from BARB (see section 6.2 for an explanation of BARB data) and measures a significant majority of adult commercial airtime for Q1 of 2014 and 2015; the economic impact data has been provided by BCAP members and covers all impacts contained in the exposure data – it is to a large extent based on estimation.

Exposure data

Timeframe	Total no. of impacts for all individuals (000s)	No of impacts removed by 4-15 index (000s)		No of impacts removed by 10-15 index (000s)	
		Number	% of all	Number	% of all
Q1 2015[4]	2,783,331	319,164	11%	384,524	14%

Economic impact data

Timeframe	4-15 index		10-15 index	
	Value of impacts removed (£)	Potential mitigation of loss (£)	Value of impacts removed (£)	Potential mitigation of loss (£)
Q1 2015	£751,701	£576,704	£974,560	£702,772

Conclusions from the data

- The impacts for Q1 2015 are 7% lower than those for Q1 2014. Further data would be needed to provide a robust analysis of the effect of the cost cap and whether overall exposure has further decreased since then.
- The impact of a scheduling restriction using either a 4-15 or 10-15 index would result in around 11% or 14% of impacts being removed from commercial airtime.
- About 80% of the revenue loss to broadcasters that would result from a 4-15 index would be likely to be mitigated by displacement into unrestricted areas of the schedule.
- About 70% of the revenue loss to broadcasters that would result from a 10-15 index would be likely to be mitigated by displacement into unrestricted areas of the schedule.
- Overall, scheduling restrictions based on either a 4-15 or 10-15 index would not be likely to have a significant effect on the number of impacts removed from commercial airtime, and as such would not cause significant revenue loss to broadcasters.

[4] The total number of impacts for all individuals in Quarter 1 2014 was 2,988,983. The table above focuses on what the impact of either form of scheduling restriction would be in the context of the broadcast advertising market for HCSTC products since the introduction of the FCA cost cap.

Furthermore, the majority of loss that did occur would be likely to be mitigated by broadcasters by displacement into unrestricted areas of the schedule.

BCAP notes that the relatively modest effect set out above could demonstrate that a scheduling restriction would not have an effect on broadcasters that was disproportionate to its aim, supporting a case for the restriction; equally, it might suggest that such a restriction is unneeded for the protection of younger viewers, because they are not meaningfully being targeted with HCSTC ads. BCAP invites respondents' views on the implications of the data.

9. Questions

Please tell us which of the following statements you agree with. Please explain your reasons.

1. **The imposition of additional restrictions, including 120-index scheduling restrictions is not necessary or proportionate;**
2. **The introduction of 120-index scheduling restrictions to prevent HCSTC ads from being appearing in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16 is necessary and proportionate; or**
3. **The introduction of 120-index scheduling restrictions to prevent HCSTC ads from being appearing in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 18 is necessary and proportionate.**

BCAP will consider responses in the light of the information provided in this consultation document. Please bring to our attention any evidence that might support your preferred option that is not set out in the document.

10. Next Steps

BCAP is committed to considering all responses carefully and with an open mind.

Given the sector-specific nature of this consultation, BCAP would in particular welcome responses from stakeholders with an interest or expertise in matters related to consumer credit.

Responses have been invited from a cross-section of interested parties representing both consumers and the industry.

The following summarises the consultation process and subsequent stages of BCAP's consideration of the proposed changes to the Code:

- The consultation will run for 10 weeks, it will close at **5pm on Wednesday 16 December 2015**
- BCAP will consider each response carefully and evaluate all significant points explaining the reasons behind the decisions it makes
- The consultation evaluation will be published on the BCAP website when the outcome of the consultation is announced

11. Responding to this consultation

11.1 How to respond

BCAP invites written comments, including supporting evidence on the proposals contained in this document, by 5pm Wednesday 16 December 2015.

When responding, please state if you are doing so as an individual or a representative of an organisation. Also, please make clear what your individual interest is or who your organisation represents. It will be helpful if you explain fully and clearly why you hold your opinion.

Responses via email with attachments in Microsoft Word format are preferred to assist in the processing of responses.

Please send your response to jamesc@cap.org.uk.

If you are unable to reply by email, you may submit your response by post or fax (+44 (0)20 7404 3404), marked with the title of the consultation, to:

BCAP Payday Loans Consultation
Regulatory Policy Team
Broadcast Committee of Advertising Practice
Mid City Place
71 High Holborn
London WC1V 6QT

11.2 Confidentiality

BCAP considers that everyone who is interested in the consultation should see the consultation responses. In its evaluation document, BCAP will publish all the relevant significant comments made by respondents and identify all non-confidential respondents. The evaluation will be published with the outcome of the consultation.

All comments will be treated as non-confidential unless you state that all or a specified part of your response is confidential and should not be disclosed. If you reply by email or fax, unless you include a specific statement to the contrary in your response, the presumption of non-confidentiality will override any confidentiality disclaimer generated by your organisation's IT system or included as a general statement on your fax cover sheet.

If part of a response is confidential, please put that in a separate annex so that non-confidential parts may be published with your identity. Confidential responses will be included in any statistical summary of numbers of comments received.

Contact us

Broadcast Committee of Advertising Practice
Mid City Place, 71 High Holborn
London WC1V 6QT

Telephone: 020 7492 2200
Textphone: 020 7242 8159
Email: enquiries@cap.org.uk

www.cap.org.uk

Follow us: @CAP_UK